Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *D. T. v. Minister of Employment and Social Development,* 2017 SSTGDIS 84

Tribunal File Number: GP-15-3190

BETWEEN:

D. T.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

HEARD ON: June 27, 2017

DATE OF DECISION: June 30, 2017

Canada

REASONS AND DECISION

OVERVIEW

[1] The Respondent received the Appellant's application for a *Canada Pension Plan* ("CPP") disability pension on January 19, 2015. The Appellant claimed that she was disabled because she had herniated discs and pinched nerves that caused pain and numbness in her back and leg. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] To be eligible for a CPP disability pension, the Appellant must meet the requirements set out in the CPP. The Appellant must usually be found disabled as defined in the CPP on or before the end of the minimum qualifying period ("MQP"). The calculation of the MQP is based on the Appellant's contributions to the CPP. The Tribunal finds the Appellant's MQP to be December 31, 2017. As the MQP ended after the date of the hearing, the Appellant must instead be found disabled on or before the date of the hearing.

[3] This appeal was heard by Teleconference for the following reasons:

a) There are gaps in the information in the file and/or a need for clarification.

b) This method of proceeding respects the requirement under the Social Security Tribunal Regulations to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[4] The following people attended the hearing: D. T. (Appellant).

[5] The Tribunal has decided that the Appellant is not eligible for a CPP disability pension, for the reasons set out below.

EVIDENCE

[6] The Appellant is 63 years old and lives with her husband in X, Ontario. She has a Grade 11 education and was most recently employed as a full-time letter carrier with Canada Post. She started that job on January 16, 1990; her last day of active work was November 1, 2013.

She stopped working due to a “hurt back”; at the time of application, she said that her medical condition prevented her from sitting or standing for very long.

[7] At the hearing, she said that she is unable to work due to the pain. She is unable to stand or sit and does not even walk in her yard very much. After activity, she needs to take pills and go to bed. She said that her back muscles cannot relax because they are protecting her spine. She frequently described her spine as “scrunching”. She said that this has not changed since she stopped working.

Events Prior to the Application for CPP Disability Benefits

[8] The Appellant had a number of different jobs before working for Canada Post. These jobs included stocking shelves at A&P, operating a lathe at Emerson, making jeans at Lee, accounting for the Canadian Armed Forces, and making yarn at Millhaven Fibres. She did not have any special training in accounting: she was assigned to this job after completing her basic training for the military. She also described it as “all paper”, as this preceded the era of highly computerized accounting.

[9] On November 8, 2013, the Appellant began an extended sick leave. At some point, the Appellant tried lighter duties (sorting mail and flyers) with Canada Post. However, she reported that twisting and standing or sitting made her back worse. When asked at the hearing when this took place, she was unable to provide a definitive answer. She thought that it might have been during her sick leave but explained that “my brain’s mush” and that she could not even remember what she did that morning.

[10] At the hearing, the Appellant described having to sit on people’s porches when she was still delivering mail. She did that because she could not feel her legs when walking. She asked for more drop boxes along her route, as she believed that she was carrying too much weight. However, she believes that “the damage was done” by then and there was no way that she could continue carrying anything on her back.

[11] Imaging of the spine on November 13, 2013 revealed mild to moderate narrowing and spurring at the L3-L4 disc. There was mild narrowing of the L5-S1 disc, with facet joint showing marked narrowing at that level. An MRI of the lumbar spine on December 3, 2013

showed mild multilevel spondylotic changes. There was a small disc herniation at L5-S1, without definite neural impingement or significant spinal stenosis. A further lumbar spine MRI on May 29, 2014 revealed an "interval enlargement of the left posterocentral and paracentral focal disc protrusion at L5-S1, causing compression on the traversing left S1 nerve roots at the subarticular access."

[12] The Appellant stated in her application materials that she was no longer able to work because of her medical condition in May of 2014. She commenced a leave of absence from Canada Post on May 30, 2014. Her CPP record of earnings and contributions reveals that she had earnings of $23,321 in 2014.

[13] While she indicated in her January 2015 application materials that she had received regular Employment Insurance ("EI") benefits during the preceding two years, she did not provide specific dates. When asked about this at the hearing, she said that she had to apply for EI once her regular sick days and extended sick leave were used up (in May of 2014). She could not recall how long she received EI benefits but suggested that it was sickness EI rather than regular EI. She also thought that it was not for very long and only lasted until she began to receive short-term disability benefits through her employer's insurer.

[14] A September 26, 2014 spinal MRI showed cervical spondylotic disease, including moderate left C5-C6 neural foraminal compromise. However, there had been a decrease in the size of the left paracentral disc protrusion at L5-S1.

[15] Dr. Ronald Pokrupa (Neurosurgery) assessed the Appellant on December 23, 2014. She reported right buttock and leg pain for over a year: this was worse with activity but was always present with some fluctuation. Some relief was obtained by sitting or lying down. The pain was deep and produced a nauseating sensation. The right leg felt like it was cold or vibrating and there was numbness extending into the toes when she stood for a prolonged period. She was only taking Extra Strength Tylenol, as other medications were ineffective.

[16] Dr. Pokrupa did not think that the MRIs showed abnormalities that could explain her symptoms and, as a result, he was uncertain of the origin of her pain. He had nothing to offer

her from a neurosurgical perspective, although he thought she should be evaluated for peripheral vascular disease as she was a smoker.

[17] In a Questionnaire dated January 16, 2015, the Appellant said that she also had aggressive cataracts. She had seen Dr. Joseph Reed (Chiropractor) in June 2014 and an unknown neurologist in December 2014; she had also received physiotherapy but stopped the physiotherapy “until my other tests are completed [and] then [I] will start again”. At the hearing, she said that her cataracts had since been fixed. She was no longer seeing Dr. Reed and could not remember when she last saw him. She said that chiropractic treatment and physiotherapy were the same: after driving 6 km home from the treatment, she would be in worse shape. However, she then said that she might see Dr. Reed again because the “traction” treatment did provide her with some relief.

[18] At the hearing, the Appellant could not remember when she last attended physiotherapy, nor could she remember the name of her physiotherapist. The physiotherapist apparently thought that she was not gaining any further benefit from attending. She was told to do the exercises at home “because it would be a waste of time otherwise”. The Appellant said that the physiotherapy and associated acupuncture “felt great” but her condition reverted as soon as she got up and drove home.

[19] As for the unknown neurologist, the Appellant still could not recall his name at the hearing but said that he was “an idiot” who was at Kingston General Hospital. She was referred to him because of numbness in her legs when she was standing. The neurologist thought that it was related to her smoking; the Appellant stated that her family physician did not agree.

[20] In the Questionnaire, the Appellant also said that she had stopped taking all medications because she was in too much of a fog and they only covered up her problems. She said that she wanted to fix her problems, rather than add to them. She provided a list of functional limitations: the main ones included sitting and standing (she feels sick to her stomach after 10 minutes because of the pain), walking, lifting/carrying (nothing heavier than her wallet), and household maintenance (does one thing per a day, and then she is “down and out”). She wrote that her memory was “fine at times” but she had a hard time with dates.

Events After Her Application for CPP Disability Benefits

[21] Dr. Craig Mitchell (Family Physician) prepared a Medical Report for the Appellant's application on January 30, 2015. He provided a diagnosis of degenerative disc disease, in connection with findings of severe pain, decreased range of motion, and decreased functionality due to back pain. She was not taking any medication and no further investigations were planned. The only treatment was physiotherapy and her prognosis was "stable". This is the most recent medical document in the Tribunal file.

[22] On May 30, 2015, the Appellant ended her leave of absence from Canada Post and formally retired. A questionnaire about her employment was later completed by a Canada Post representative but it was extremely vague. The quality of the Appellant's work and her attendance were both unknown. It was unknown if she required any special services, equipment or arrangements. It was also unknown if she required help from her co-workers or if she was able to handle the demands of her job. The reasons for absences were simply "sick leave" and "short-term disability".

[23] In a letter dated August 22, 2015, the Appellant wrote that she was in severe pain all the time from her back and was on medication because of her pain. She said that it dulled the pain a little but did not fix the problem; it also prevented her from thinking clearly and driving her car. At one point, she was confused and took 9 weeks' worth of medication in a 9-day period. She spent half the day in bed because the pain was so draining. She was waiting impatiently to get into the pain clinic in Kingston. She hoped that this would provide some relief, as she wanted to work or volunteer but was unable to do so unless there would be a big change in her condition.

[24] In a document dated September 7, 2015, the Appellant said that she could no longer remember much, due to her medication and back pain. She was unable to sit or stand for very long and would sometimes forget what she was doing. She remained keen to get into the pain clinic and perhaps discontinue medication as that "might clear my head." A few days later, she wrote that she was unable to wait for the pain clinic and was going to see her family doctor about trying medical marijuana in order to get some relief.

[25] When asked what had happened medically since Dr. Mitchell's January 30, 2015 Medical Report, the Appellant said that she had not seen any specialists related to her disability as she was waiting for her pain clinic appointment. She is currently suffering from a "cold" that has lasted since late 2016. A hoarse-sounding cough was evident throughout the hearing. She said that her cold tightens her up and gives her spasms; the coughing also plays havoc with her back. As a result, she said that her "whole life has changed". She said that she recently had some chest X-rays and will be reviewing the results with Dr. Mitchell on July 17, as that is the first date he will be available. She no longer has foot numbness, as she is not walking as much.

[26] The Appellant said she has also been seeing an ear, nose and throat specialist named Dr. Chan. He arranged for an MRI of her head to be done on July 5, 2017. Dr. Chan wanted the MRI done because he observed that the back of her tongue was thicker than it should be. Dr. Chan thought that she might be suffering from bronchitis but was not sure. The next appointment with Dr. Chan will be on July 25, 2017.

[27] While Dr. Mitchell is still the Appellant's family physician, she does not see him much because he is often unavailable. When she has a problem, she goes to the Emergency department. She has done that three times since last Christmas in connection with her ongoing cough and cold. Each time, they just gave her some nose spray. Dr. Mitchell's role appears to be limited to prescriptions. She did not think that his prognosis for her had changed since January 2015; he apparently told the Workplace Safety & Insurance Board that her back problem was caused by her job. However, she also said that Dr. Mitchell thought her discs were deteriorating, although he was not sure if surgery would be necessary one day.

[28] The Appellant described Dr. Mitchell as "brutal", as he (or somebody in his office) apparently neglected to send out the pain clinic referral until May of 2016. She first mentioned that she was waiting for the referral in her August 22, 2015 letter. As a result, she found out on the day before the hearing that her first pain clinic appointment would be on July 18, 2017.

Other Evidence from the Hearing

[29] With respect to medication, the Appellant said that drugs have a really strong effect on her. She is currently taking Gabapentin, as this appears to work best for her, and has done so

essentially since she stopped working. She tries not to take too much, but needs some to take the edge off her pain so that she can function at home. She said that there had been a lot of deaths in her family this year, so she was taking a lot of medication just to function. Otherwise, she treats herself at home: she rides a stationary bicycle, does the exercises given by her physiotherapist, and uses a heat massager on herself.

[30] The only other medication taken recently by the Appellant is medical marijuana. She said that it was fine at night and helped her sleep, but she did not think it was good for daytime use. As it costs $90.00 per bottle and is not covered by her drug plan, she has now stopped taking it altogether. She also does not like the "high" feeling and cannot function in that condition. She does not drink alcohol either.

[31] The Appellant has not done any paid or volunteer work since November 2013, nor has she applied for any jobs since then. There is no job that she can see herself doing and she has not taken any recent courses or training. However, she said that this was not how she planned her retirement years and still wished that something could be done for her back.

[32] Although her husband did the housework for quite a while, the Appellant said that she now tried to do it because she needs to do something and does "not want to live in a pigsty". She can do the vacuuming but pointed out that the house was only 900 square feet. Afterwards, she will lie down. She might also skip doing housework if she did not feel like doing it. She also prepares the meals and does the laundry once per week. Her husband does all of the outside chores.

[33] The Appellant still drives because her husband works during the day and she needs to be able to get around. She drives to X (a distance of 6 km) twice per week. While she can drive to X or X (approximately 30 minutes away), she said that she is usually in bed for 4-5 hours after getting home. Other than appointments, she does not travel anywhere. She will do the grocery shopping if she feels up to it; her husband will do it otherwise. She said that they now eat more take-out food than they did before.

[34] The Appellant does not use her computer very often, but uses her iPhone device for perhaps three hours per day. She uses it mainly for social media and games. She also reads a

lot and watches television. On a typical day, she goes to bed by 8:00 or 8:30 p.m. and gets up at 6:00 a.m. She will also sleep during the day for 2-4 hours, starting at about 11:00 a.m. She said her daily routine has been the same since she stopped working.

SUBMISSIONS

[35] The Appellant submitted that she qualifies for a disability pension because:

a) She is unable to work because of her ongoing pain and inability to tolerate any level of activity;

b) She is sensitive to medication and struggles to strike a balance between dulling the pain and being able to have some level of function; and

c) She wants to work and she did not choose to have a disabled existence.

[36] The Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The severity of a disability is not based on an inability to perform one's regular job, but rather any substantially gainful occupation;

b) Her lumbar and cervical MRI reports do not show abnormalities to explain her symptoms in either her lumbar or cervical spine; and

c) While she may have some limitations and has difficulties performing physical tasks, the evidence does not show any severe pathology or impairment which would prevent her from performing suitable work within her limitations prior to December 2017.

ANALYSIS

Test for a Disability Pension

[37] The Appellant must prove on a balance of probabilities that she was disabled as defined in the CPP on or before the hearing date.

[38] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the MQP.

[39] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

Severe

[40] The severe criterion must be assessed in a real-world context (*Villani v. Canada (A.G.)*, 2001 FCA 248). This means that when deciding whether a person's disability is severe, the Tribunal must keep in mind factors such as age, level of education, language proficiency, and past work and life experience. In this case, the Appellant is close to the typical retirement age and has a Grade 11 education. She speaks English fluently and has worked at a number of diverse jobs, although she spent most of her working life as a letter carrier. In the circumstances, it is not reasonable to expect her to undertake extensive retraining in order to pursue a substantially gainful occupation.

[41] Unfortunately, with the evidence provided, assessing the Appellant's level of disability is quite difficult. Although she describes significant pain and functional impairment, there is very little objective documentation before the Tribunal. The most recent medical report is from January 30, 2015 and was therefore roughly 29 months old by the date of the hearing. Its relevance is further undermined by the Appellant's statement at the hearing that her "whole life has changed" due to the cold that she has had since December 2016.

[42] While that report from Dr. Mitchell describes severe pain and reduced functionality, it also was written at a time when the Appellant was not taking any medication. In contrast, the

Appellant testified at the hearing that she had essentially been taking Gabapentin since she stopped working. Furthermore, Dr. Mitchell provided a “stable” prognosis, indicated that the only treatment was physiotherapy, and was not planning any further investigations. However, the Appellant stated at about the same time that her physiotherapy was on hold until certain unnamed tests were concluded. She then said at the hearing that physiotherapy was ineffective and could not recall when she last attended.

[43] The Appellant’s repeated assertions that her memory was poor and her inability to recall many important details about her care both complicate this lack of current objective information. While a claimant is not expected to accurately remember everything that has happened, extensive forgetfulness and repeated assertions about a poor memory begin to undermine the reliability of evidence that is unsupported by objective documentation.

[44] In this case, the Appellant stated on January 16, 2015 that her memory was “fine at times” but she had a hard time with dates. She wrote on August 22, 2015 that medication left her in a fog and prevented her from thinking clearly. By September 7, 2015, she said that she could no longer remember much. At the hearing, she said that her brain was “mush” and that she could not even remember what she did that morning.

[45] The Appellant could not remember when she tried to do lighter duties at work. She could not remember the name of her physiotherapist or when she might have last attended physiotherapy. She still could not remember the name of her neurologist; in fact, she had already forgotten by January 16, 2015, despite having seen him in December 2014 (and despite the presence in the Tribunal file of a December 23, 2014 neurosurgeon’s report). She could not remember when she last saw her chiropractor. She could not provide certainty as to when she received EI benefits. She also provided contradictory evidence about the nature of those benefits: she stated that these were “sickness” EI benefits at the hearing but indicated on the 2015 Questionnaire that they were regular EI benefits.

[46] The Tribunal stresses that the Appellant’s memory problems are not, in and of themselves, the main issue here. The Appellant cannot be faulted for a loss of memory. In some circumstances, a loss of memory might even support a finding that a claimant is severely disabled. However, there is no objective evidence of any memory or cognitive issues. Her

memory issues would also be much less problematic if there had been some recent objective documentation that could support the Appellant's evidence about her pain and other limitations.

[47] As a consequence of the concerns identified above, the Tribunal has difficulty assigning much weight to the Appellant's evidence concerning her symptoms and ability to work. Alas, the Tribunal also cannot place much reliance on the most recent objective documentation. That documentation is now 29 months old and was prepared at a time when the Appellant's treatment and symptoms were different: for example, she was not taking any medication then, nor had her "whole life changed" due to her prolonged cough and cold symptoms that first appeared at the end of 2016. There is also some current evidence that might support some work capacity, if only on a part-time basis: for example, the Appellant still does some tasks (including meal preparation) around the home and also uses her iPhone for about three hours each day. Although this evidence is of limited probative value in establishing any kind of capacity for pursuing a substantially gainful occupation, it nonetheless underscores the importance of having recent objective documentation to clarify the Appellant's current capabilities.

[48] With no recent objective documentation available to support the Appellant's claims, and being unable to place much weight on her own evidence or the medical documentation that does exist, the Tribunal simply cannot conclude on a balance of probabilities that the Appellant is incapable regularly of pursuing a substantially gainful occupation. The Tribunal therefore finds that the Appellant has not established a severe disability by the date of the hearing.

[49] The Tribunal is not suggesting that the Appellant has no symptoms or medical conditions. There was, for example, some older MRI evidence that showed the existence of spinal issues. Dr. Mitchell also attested to the existence of degenerative disc disease. However, it is the impact of those conditions on the claimant's capacity to work that determines the severity of the disability under the CPP, rather than the existence of the conditions themselves (*Klabouch* v. *Canada (Social Development)*, 2008 FCA 33).

[50] The Appellant also indicated that she was receiving benefits from a private insurer. However, when arriving at its decision, the Tribunal must assess the evidence before it and apply the relevant legislation. It is not unusual for a claimant to qualify for disability benefits through a private insurer but not establish a severe and prolonged disability under the CPP

legislation, as there may be different definitions of disability and different sets of evidence under consideration. The Appellant's receipt of disability benefits from a private insurer is ultimately of no relevance to the Tribunal's analysis.

Prolonged

[51] As the Tribunal found that the disability was not severe, it is not strictly necessary to make a finding on the prolonged criterion. Nonetheless, even if the Appellant had established a severe disability, the Tribunal would have found that her disability was not prolonged. Once again, the lack of any objective medical evidence for the past 29 months would have been determinative, particularly in light of the significant changes in her treatment and symptoms since that medical evidence was prepared on January 30, 2015.

CONCLUSION

[52] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security